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In the Supreme Court of the United States

OCTOBER TERM, 1960

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

These are direct appeals from a final judgment entered March 25, 1960, by a three-judge district court

convened pursuant to 28 U.S.C. 2284 and 2325, dismissing an action brought by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee"), to set aside an Interstate Commerce Commission order. The order dismissed the railroad's complaint seeking to require the Spokane, Portland and Seattle Railway System ("SP&S"), which is jointly owned and managed by the Great Northern Railway Company and the Northern Pacific Railway Company (the "Northern Lines"), to join Milwaukee in through routes and joint rates via Spokane, Washington, to the same extent as the SP&S participates in such routes and rates with its owners, the Northern Lines. The Commission's lengthy report is printed at 300 I.C.C. 453, and reproduced in the railroad appellees' motion to affirm.

The purpose of the complaint was to enable the Milwaukee to share in bridge traffic, principally eastbound shipments of forest products, moving between Washington and Oregon points located on the SP&S and points located generally east of those served directly by the Milwaukee (300 I.C.C. at 482). In dismissing the complaint, the Commission held:

(1) Except for certain commodities moving to and from points on the Milwaukee and export-import traffic, through routes were not in existence between the Milwaukee and the SP&S on traffic via the Spokane gateway, since "[t]here is no indication that any traffic has ever been solicited for routing via Spokane over a Milwaukee-S.P. & S. route by which a higher combination rate applied, or has ever moved over such a route" (300 I.C.C. at 460–461). Apart from the

foregoing exceptions, "'the carriers' course of business' has been and is to use routes via Spokane composed of the S.P. & S. and the Great Northern or the S.P. & S. and the Northern Pacific" (*ibid.*).

(2) The Northern Lines were entitled to the protection given by Section 15(4) of the Interstate Commerce Act (49 U.S.C. 15(4)) against being "short hauled" through the establishment of through routes unless the Commission finds, *inter alia*, that such routes are needed "in order to provide adequate, and more efficient or more economic, transportation * * *." Section 15(4) imposes this limitation upon the authority of the Commission to establish a through route that would "require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad *operated in conjunction and under a common management or control therewith,* which lies between the termini of such proposed through route * * *" (emphasis added). The Commission found (300 I.C.C. at 471) that "the S.P. & S. system lines are operated in conjunction with and under a common management and control with the northern lines, as that term is used in section 15(4) of the act", and that "the S.P. & S. is not unlawfully discriminating in its rates and charges between the northern lines and the Milwaukee."

(3) "[I]t is not shown to be necessary or desirable in the public interest, in order to provide adequate and more efficient or more economical transportation, to require the establishment of through routes and joint rates in connection with the S.P. & S. system

and the Milwaukee and its connections via Spokane the same as apply in connection with the S.P. & S. system and the northern lines and their connections via Spokane" (300 I.C.C. at 498). The Commission pointed out (300 I.C.C. at 496) that "there is no contention" by Milwaukee that "the present routes of the defendants in connection with the northern lines are not adequate for the traffic involved," and it ruled (*ibid.*) that the "testimony in behalf of shippers and receivers" was not "sufficient to require that the through routes and joint rates, as sought by the complainant, be established."

The district court unanimously sustained the Commission's order. 182 F. Supp. 81, Milwaukee J.S. 1a–16a. It held that the "short-hauling" restriction of section 15(4) protects not only a single railroad which controls or manages another, but also two railroads which actively and jointly manage and control a connecting subsidiary. (Milwaukee J.S. 16a). The court also held, "after a careful review of the record" (*ibid.*), that the Commission's findings on the other issues "are supported by substantial evidence and, thus, should not be disturbed."

ARGUMENT

I

The principal issue in this case—whether a railroad is "operated * * * under common management or control" with another railroad within the meaning of Section 15(4) when it is operated under the joint management and control of two railroads—is one that has rarely arisen. Appellants point to only two

other administrative proceedings in which this issue has risen since Congress first gave railroads statutory protection against being short-hauled in 1910 (36 Stat. 551), and those cases did not involve joint control and management of a carrier by two railroads, but by a large number.[1] The Milwaukee itself recognizes that this issue is one of first impression before the courts (J.S. 11). The paucity of litigation is due to the fact that there are relatively few instances in which two railroads jointly own and actually manage, or control the traffic policy of, a common rail subsidiary.

But whatever may be the importance of the question, we submit that the Commission correctly interpreted Section 15(4) as covering two railroads which own and operate an intermediate carrier under their joint and equal "common management or control." The obvious purpose of the "common management or control" provision of Section 15(4) is to prevent a railroad from being short-hauled not only on its own lines but also on the lines of an intermediate affiliated carrier which, as a practical matter, is operated under its control and management as an integral part of its system. And, as the district court pointed out (Milwaukee J.S. 14a):

> The decision of the Commission in this case is consistent with this purpose, and there has been no sound reason, economic or otherwise, advanced

[1] *Restriction in Absorption of Switching Charges of Alton & Southern Railroad*, 157 I.C.C. 129, and *Manufacturers Railway Co.* v. *Ahnapee & Western Railway Co. et al.*, 172 I.C.C. 554. In both of these cases, 15 railroads owned and controlled the carrier. See note 3, *infra*, p. 8.

why two joint owners are not any less in need of long haul protection than a single railroad which controls a subsidiary.

The Secretary of Agriculture argues (J.S. 23–26) that since Section 15(4) in terms applies only to an intermediate railroad operated under common management or control of a "carrier," it does not cover a railroad operated by two "carriers." However, this literal reading of the statute would, as the district court pointed out (*supra*, p. 5), thwart rather than effectuate the basic purpose of Section 15(4) of protecting carriers against being short-hauled. Moreover, the Commission's interpretation does, in fact, satisfy the literal terms of the statute. For each of the two Northern Lines is, jointly with the other one, a "carrier" which controls and manages the S P & S.[2]

[2] The Secretary's further contention (J.S. 21–23) that S P & S is not operated in conjunction and under common management or control with the Northern Lines raises only a factual question that both the Commission and the district court resolved against him. The Commission's conclusion that the S P & S is under the common management and control of the Northern Lines rests upon detailed factual findings (300 I.C.C. at 463–469), which fully support the conclusion and which, the court below held, are supported by substantial evidence. It is also in accord with the Commission's repeated rulings that the S P & S is under the common management and control of the Northern Lines for rate-making purposes. *Portland Chamber of Commerce* v. *Oregon Railroad & Navigation Co.*, 19 I.C.C. 265 (1910); *City of Astoria* v. *S.P. & S. Ry. Co.*, 38 I.C.C. 16 (1916); *Inland Empire Shippers League* v. *Director General*, 59 I.C.C. 321 (1920); *West Coast Lumbermen's Association* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 129 I.C.C. 363 (1927); *S.P. & S. Railway Company & Oregon Trunk*, 41 I.C.C. Valuation Reports 1 (1932); *Pillsbury-Astoria Flour Mills Co.* v. *Great Northern Railway Co.*, 198 I.C.C. 642 (1934); *Helix Milling Co., Inc.* v. *Great Northern Ry. Co.*, 287 I.C.C. 77 (1952).

The Commission's interpretation of Section 15(4) is also supported by this Court's decision in *Louisville & Nashville R.R. v. United States*, 242 U.S. 60. There this Court dealt with an issue of discrimination under the predecessor of the present Section 3(4). As it then read, the section stated that the Act "shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business" (p. 73). The case involved the validity of alleged discriminations by a terminal company, jointly owned and operated by the Louisville & Nashville and another railroad, in performing switching services for the Tennessee Central railroad on less favorable terms than for its owners. This Court ruled (p. 73) that, "if either carrier owned and used this terminal alone it could not be found to discriminate against the Tennessee Central by merely refusing to switch for it," and that "what is true of one owner would be equally true of two joint owners * * *." The *Louisville* case is persuasive support for the Commission's interpretation of Section 15(4) since, as the court below pointed out (Milwaukee J.S. 15a), "the literal words of the section are singular in meaning"—as is also true of Section 15(4).

There is no basis for Milwaukee's suggestion (J.S. 11) that its construction of Section 15(4) is supported by the legislative history. There is no indication, and Milwaukee points to none, that Congress intended to limit the term "common management or control" to situations involving single, as distinguished from joint, control or management.

Nor does the legislative history of Section 1(3)(b), upon which appellants rely (Milwaukee J.S. 11–13; Agriculture J.S. 23–25), aid their cause. That section, added to the statute in 1940 (following this Court's decision in *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125), defines control as embracing relationships "between any person or persons and another person or persons." But the definition is explicitly made applicable only to certain sections of the Act, and does not apply to Section 15(4). Furthermore, when Congress added this definition to the Act, it expressly stated that it "was made to apply only in the specified sections because it was thought undesirable to make any change in the interpretation of present law in certain other provisions of the act, notably section 1(1)(a) and section 15(4)." H. Rep. No. 2832, 76th Cong., 3d Sess., p. 63.

The new definition of control in Section 1(3)(b) had nothing to do with the problem of joint versus single control[3] but, as the district court pointed out (Milwaukee J.S. 9a–10a), referrred to the numerous

[3] The Secretary of Agriculture errs in arguing (J.S. 26) that Congress in the Transportation Act of 1940 was considering the specific problem of joint control because, in an amendment to Section 5(2), it talked of acquisition of a railroad by "any carrier, or two or more carriers jointly". This language is a mere rewording of a provision, first adopted in 1933, which expressly gave the Commission jurisdiction over acquisitions by means of joint control, in line with Commission decisions so interpreting the original act. *Directors of Wheeling & Lake Erie,* 138 I.C.C. 643, 654 (1928); compare 48 Stat. 217 with 41 Stat. 481 and 54 Stat. 905; and see S. Rep. No. 87, 73rd Cong., 1st Sess., pp. 8–11, and H. Rep. No. 193, 73rd Cong., 1st Sess., pp. 15–21.

Commission interpretations that actual "control of traffic policy" was determinative of the fact of common management and control.[4] The purpose of the addition of a general definition of the term "control" was, as Milwaukee notes (J.S. 11–12), to broaden Commission jurisdiction under specified sections (other than 15(4)), so as to include power over *any* form of control, including mere power to control. But to construe this new definition as limiting the term "control" as used in Section 15(4) would restrict the Commission's jurisdiction to prescribe through routes—a result that Congress plainly wished to avoid when it enacted Section 1(3)(b).

II

Appellants' other contentions—that the Commission erred in finding that through routes were not in existence, and that the Milwaukee had failed to show the need for their establishment—relate to the sufficiency of the evidence. Each of these was fully presented

[4] Contrary to Milwaukee's statement (J.S. 13), the lower court did not disregard the two division reports dealing with the operation of the Terminal Railroad Association of St. Louis. See ftn. 1, *supra*. The lower court found these cases, holding that the terminal's ownership by 15 carriers and control by majority vote did not constitute operation under common management or control, not persuasive because of their very short treatment of the issue and the large number of owners. Moreover, under a judicial antitrust decree, the Terminal was permitted to exist and continue as a lawful unification of terminal facilities for the interchange, collection and distribution of traffic *of all railroads* desiring to use its facilities upon equal terms, regardless of whether they were or are proprietary or nonproprietary companies. See 172 I.C.C. at 560.

to, and rejected by, both the Commission and the court below, and there is no occasion for further review of these factual questions by this Court.

1. "The question [whether a through route exists] in each case is one of fact" (*Denver & R.G.R. Co.* v. *Union P.R. Co.*, 351 U.S. 321, 327). "[T]he test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service" (*Thompson* v. *United States*, 343 U.S. 549, 557; *Denver* case, *supra*, at 330). A through route may exist for a particular commodity and not for others, and between particular points via the same gateway but not others. *Denver* and *Thompson* cases, *supra*.

The Commission applied the foregoing criteria in determining whether through routes exist between the SP&S and the Milwaukee via the Spokane gateway to points beyond those served by the Milwaukee (300 I.C.C. at 458–461). It pointed out (p. 460) that, although during 1952 513 carload shipments on through bills of lading were interchanged at Spokane between the SP&S and the Milwaukee (both eastbound and westbound), all but 14 of them were destined to, or originated on, points on the Milwaukee itself; and all of them moved at joint through rates.[5] The Commission further found (300 I.C.C. at 460–461, emphasis added),

[5] Although the Secretary of Agriculture (J.S. 18), but not Milwaukee, takes exception to the Commission's finding that all of these cars moved on joint rates, the Traffic Manager of the S.P. & S., when asked whether the route could be used at the combination rates stated (R. 3529): "We have never had any traffic like that offered to us so I am not going to speculate what we would do." See also R. 1198.

however, that "[t]here is no indication that any traffic has ever been solicited for routing via Spokane over a Milwaukee-S.P. & S. route by which a higher combination rate applied, *or has ever moved over such a route*"; and that, except for the traffic that moved under the joint rates, primarily to points on the Milwaukee's lines, " 'the carriers' course of business' has been and is to use routes via Spokane composed of the S.P. & S. and the Great Northern or the S.P. & S. and the Northern Pacific." These findings, upheld by the court below, fully support the Commission's conclusion (300 I.C.C. at 461) that, except for traffic to points primarily on the Milwaukee's lines, "there are no through routes, as that term is used in the act, between the areas comprised in the complaint [*i.e.*, points east of those served by the Milwaukee], in connection with the S.P. & S. system and the Milwaukee via Spokane."

2. The Commission, of course, may itself prescribe through routes and joint rates which result in short-hauling, upon a finding that such routes and rates are needed in order to provide adequate, and more efficient or more economical, transportation (Section 15 (4)), or if the existing routes and rates result in undue preference and prejudice between shippers or localities (Section 3(1)) or discriminate between connecting lines (Section 3(4)).*

* Milwaukee has conceded that under the facts here there can be no violation of Section 3(4) if the S.P. & S. is under a common management or control with the Northern Lines (J.S. 10a, 17).

As its report shows, the Commission fully considered all the evidence concerning the alleged need for additional through routes, but concluded that the Milwaukee had failed to establish the need therefor. It emphasized the nature and number of existing through routes. (300 I.C.C. at 484–494 and 496–498.) The Commission's conclusion is buttressed by the fact that the original proceeding was instituted by a carrier rather than by shippers; and that, of the numerous shippers who testified, only one (300 I.C.C. at 495 and see R. 271–283) had requested the establishment of any additional routes prior to the Commission's hearing on the complaint. On the other hand, shippers of lumber, grain, and school, theater, and church furniture indicated (300 I.C.C. at 486, 488, and 491) that they had no need for the opening of the Spokane gateway. In short, until the Milwaukee instituted this case, there was little, if any, shipper demand for the establishment of additional through routes.

The shipper witnesses who supported the Milwaukee relied mainly on their general desire for additional through routes, rather than on any claim of preference and prejudice. Milwaukee points to only two instances—mill operators and grazers of sheep—where a showing of undue preference and prejudice between shippers is claimed to have been established (J.S. 17). The Commission's discussion of the evidence relating to these two commodities (300 I.C.C. at 485–486, 487, 493, and 498) fully supports its conclusion that, even as to them, undue preference and prejudice was not shown.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeals present no substantial question and that the judgment of the district court should be affirmed.

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